Neptune Aviation Ltd v Sheikh Salleh bin Sheikh Abod & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-127–04 OF 2018
WONG CHEE LIN JC
25 JUNE 2018

Civil Procedure — Injunction — Application for — Interim mandatory and prohibitory injunction — Whether special circumstances existed for granting of interim mandatory injunction — Whether balance of convenience and justice lay in favour of plaintiff for court to grant prohibitory injunction — Whether plaintiff entitled to use of aircraft documentation and listed items

The present case concerned on prayers 8, 9 and 10 of a notice of application in encl 5 for Anton Piller orders against the first and second defendants. The plaintiff was a company incorporated as a Labuan company and the owner of an aircraft known as Boeing 737-400 aircraft bearing manufacturer's serial number MSN 26452, 9 M-MMX ('9M-MMX'). At all material times, the plaintiff owned all the aircraft's continuing airworthiness records, lay books, weigh schedule, manuals, maintenance reports, technical data and all other documents relating to the aircraft together with any documents to release any encumbrance on the aircraft ('aircraft documentation'). On 24 January 2018, the first defendant together with representatives and employees of the second defendant took and removed the aircraft documentation and the plaintiff's books, records and accounts ('listed items') from the plaintiff's premises. The aircraft documentation and the listed items were suspected to be kept at the premises of the second defendant. The plaintiff had sold the aircraft 9M-MMX to a third party buyer known as Nasim Air. The plaintiff was obliged to deliver the aircraft together with the aircraft documentation to the buyer upon receipt of full purchase price. The first defendant had signed the aircraft sale agreement dated 4 April 2017 as the director of the plaintiff. The plaintiff then made the following prayers: (a) prayer 8 was an interim mandatory injunction to compel the return to the plaintiff of aircraft documentation and the listed items; (b) prayer 9 was to restrain the defendants from using, destroying, parting with possession, converting the aircraft documentation and listed items, unlawfully interfering with the plaintiff's trade and business and conspiring and agreeing to commit unlawful acts to interfere with the plaintiff's trade and business; and (c) prayer 10 was for liberty to the plaintiff to use the aircraft documentation and listed items.

Held, granting order in terms of prayers 8, 9 and 10 of the notice of application in encl 5:

(1) In the present case, the aircraft documentation and the listed items were indisputably belonged to the plaintiff. The act of the second defendant in entering the plaintiff's premise and removing the aircraft documentation and the listed items was clearly amounting to conversion of the plaintiff's property. Accordingly, the court found that there existed special circumstances and the case was clear on where the grant of an interim mandatory injunction could be supported (see paras 15–17).

(2) The plaintiff would suffer irreparable damage if the prohibitory injunction was not granted because the listed items did not merely involve the subject aircraft but also books, records and accounts of the plaintiff for the conduct of the business. In the event the injunction was granted, and the defendants should succeed at the trial, the damage caused to the defendant would be minimal as the running of the business would not be affected by the injunction. The balance of convenience and the justice of the present case clearly lay in favour of the plaintiff. Accordingly, the interim injunction in terms of prayer 9 ought to be granted to preserve the status quo (see paras 21, 24–25 & 27).

(3) Prayer 10 was for the recognition of the fact that the listed items belonged to the plaintiff and were required for the conduct of the business. Prayer 10 was ancillary or complementary to prayers 8 and 9 and 10 and therefore should be granted (see paras 28–29).

[Bahasa Malaysia summary

Kes semasa adalah berkenaan dengan permohonan 8, 9 dan 10 notis permohonan dalam lampiran 5 untuk perintah Anton Piller terhadap defendan pertama dan defendan kedua. Plaintif merupakan syarikat yang beroperasi sebagai sebuah syarikat di Labuan dan merupakan pemilik sebuah pesawat dikenali sebagai pesawat Boeing 737-400 bernombor siri pendaftaran MSN 26452, 9 M-MMX ('9M-MMX). Pada masa material, plaintif memiliki kesemua rekod penyambungan penerbangan pesawat, lays books, jadual pemberat, manual, laporan penyelenggaraan, data teknikal dan semua dokumen berkaitan dengan pesawat bersama-sama dengan segala dokumen untuk melepaskan halangan penerbangan pesawat ('dokumentasi pesawat'). Pada 24 Januari 2018, defendan pertama bersama-sama wakil dan pekerja-pekerja defendan kedua mengambil dan mengalihkan dokumentasi pesawat dan buku-buku kepunyaan plaintif, rekod-rekod dan akaun-akaun ('barang-barang tersenarai') daripada premis plaintif. Dokumentasi pesawat dan barang-barang tersenarai disyaki disimpan di premis kepunyaan defendan kedua. Plaintif telah menjual pesawat 9M-MMX kepada pihak ketiga dikenali sebagai Nasim Air. Plaintif telah membuat penghantaran pesawat tersebut bersama-sama dengan dokumentasi pesawat kepada pembeli setelah pembayaran penuh dibuat. Defendan pertama telah menandatangani perjanjian penjualan pesawat pada 4 April 2017 sebagai pengarah kepada plaintif. Plaintif kemudiannya membuat permohonan-permohonan berikut:

A (a) permohonan 8 iaitu injuksi mandatori sementara untuk mengarahkan supaya dokumentasi pesawat dan barang-barang tersenarai dipulangkan kepada plaintif; (b) permohonan 9 adalah untuk menghalang defendan-defendan daripada menggunakan, memusnahkan, berkongsi pemilikan, mengubah dokumentasi pesawat dan barang-barang tersenarai, B mencampuri perniagaan dan perdagangan plaintif secara tidak sah dan bersetuju untuk melakukan perbuatan yang tidak sah untuk mencampuri urusan perdagangan dan perniagaan plaintif; dan (c) permohonan 10 adalah untuk kebebasan kepada plaintif untuk menggunakan dokumentasi pesawat dan barang-barang tersenarai.

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Diputuskan, membenarkan perintah berkenaan dengan permohonan 8, 9 dan 10 notis permohonan di dalam lampiran 5:

(1) Dalam kes semasa, dokumentasi pesawat dan barang-barang tersenarai D tidak diragui merupakan kepunyaan plaintif. Tindakan defendan kedua memasuki premis plaintif dan mengalihkan dokumentasi pesawat dan barang-barang tersenarai secara jelas merupakan satu pencerobohan kepada harta benda kepunyaan plaintif. Oleh itu, mahkamah mendapati terdapat keadaan khas yang berlaku dan ini membolehkan satu injuksi E mandatori sementara dikenakan (lihat perenggan 15–17).

(2) Plaintif akan mengalami kerugian yang tidak dapat diperbaiki sekiranya injuksi penghalangan tidak dibenarkan disebabkan barang-barang tersenarai bukan sahaja melibatkan subjek kepada pesawat tetapi juga F mengandungi buku-buku, rekod-rekod dan akaun-akaun milik plaintif yang menyumbang pada perjalanan perniagaan plaintif. Sekiranya injuksi tersebut dibenarkan, dan defendan berjaya dalam perbicaraan, kerosakan kepada defendan akan dapat dikurangkan dan perjalanan perniagaan tidak akan terkesan dengan injuksi tersebut. Keseimbangan G kesenangan dan keadilan adalah dengan jelas berpihak kepada plaintif. Oleh itu, injuksi sementara sepertimana dalam permohonan 9 hendaklah dibenarkan untuk menjamin status quo (lihat perenggan 21, 24–25 & 27).

H (3) Permohonan 10 adalah untuk kepastian fakta yang mengatakan barang-barang tersenarai adalah kepunyaan plaintif dan diperlukan untuk menjalankan perniagaan. Permohonan 10 adalah sampingan kepada permohonan 8, 9, dan 10 hendaklah dibenarkan (lihat perenggan 28–29).]

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Notes

For cases on application for injunction, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3964–4031.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)
Cekal Berjasa Sdn Bhd v Malaysia Building Society Bhd [2005] 3 MLJ 646, HC (refd)
Dato' Jaffar bin Mohd Ali & Anor v Jasatera Bhd & Ors [2000] 2 MLJ 277, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Locabail International Finance Ltd v Agroexport and others; The Sea Hawk [1986] 1 All ER 901, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132, FC (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192, SC (refd)

Shamala Devi a/p Balasundaram (Michelle Khor Chiew Hong with her) (Chooi & Company) for the plaintiff.
Cherian Kururila (Zubeda & Amarjeet) for the second defendant.

Wong Chee Lin JC:

[1] This case concerns prayers 8, 9 and 10 of a notice of application in encl 5 for anton piller orders against the first and second defendants. On 11 April 2018, I granted orders in terms of the prayers in the notice of application on an ex parte basis, save for prayers 8, 9 and 10 thereof which I directed to be heard inter partes. Since then, the plaintiff has attempted to execute the anton piller orders but did not succeed in doing so because they could not access the locations where the subject documents are suspected to be kept. The plaintiff has served the cause papers on the second defendant on 26 April 2018 but has not succeeded in serving the first defendant. The second defendant was present at the hearing of prayers 8, 9 and 10 on 14 May 2018 but informed the court that it is not in the position to take any part in the proceedings due to lack of instructions. The counsel for the second defendant asked the court to wait until the first defendant was served before proceeding with the hearing but I decided to proceed with the hearing of prayers 8, 9 and 10.

[2] After hearing the plaintiff, I granted order in terms of prayers 8, 9 and 10 of the notice of application, with amendments. These are the full reasons for my decision.

SALIENT BACKGROUND FACTS

[3] The plaintiff is a company incorporated as a Labuan company and the owner of an aircraft known as Boeing 737-400 aircraft bearing manufacturer's

A serial No MSN 26452, 9M-MMX ('9M-MMX'). At all material times, the plaintiff as the legal owner of aircraft 9M-MMX owns all of the aircraft's continuing airworthiness records, log books, weigh schedule, manuals, maintenance reports, technical data and all other documents especially the manuals and technical records ('aircraft documentation') relating to the aircraft
B together with any documents to release any encumbrance on the aircraft.

[4] 9M-MMX was in the process of re-registering in the plaintiff's name. However the aircraft documentation were removed, redirected and misappropriated by the defendants from the plaintiff's business premises on
C 24 January 2018. The first defendant was a director of the plaintiff until 29 January 2018 and a director of the second defendant.

[5] On 24 January 2018 the first defendant together with representatives and employees of the second defendant took and removed the aircraft
D documentation and the plaintiff's books, records and accounts ('listed items') from the plaintiff's premises. The aircraft documentation and listed items are suspected to be kept at the premises of the second defendant.

E **[6]** The plaintiff has sold the aircraft 9M-MMX to a third party buyer known as Nasim Air ('buyer'). The plaintiff is obliged to deliver the aircraft together with the aircraft documentation to the buyer upon receipt of full purchase price. The first defendant had signed the aircraft sale agreement dated 4 April 2017 as a director of the plaintiff.

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[7] The buyer has required the plaintiff to deliver the aircraft on or by 2 June 2018 (subject to payment of full purchase price) failing which the buyer will impose penalty of USD50,000 per day.

G **[8]** It is the contention of the plaintiff that as a director of the plaintiff, whilst the first defendant may have the right to inspect the documents of the plaintiff, he has no right to remove them from the plaintiff's premises. Furthermore, the first defendant purported to act on the basis of circular directors' resolutions which purported to say that the first defendant has been appointed as chairman
H of the plaintiff. However, the company secretary had informed the first defendant that the purported circular resolutions require verification. The circular resolutions were never registered by the company secretary and had been declared ineffective by the plaintiff on 29 January 2018 on which date the first defendant was removed as a director of the plaintiff.

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[9] As the defendants clearly have no right to remove and keep the aircraft documentation and the listed items which belong to the plaintiff, I granted the anton pillers orders sought by the plaintiff on 11 April 2018 except for prayers 8, 9 and 10.

[10] Prayer 8 is an interim mandatory injunction against the defendants to compel the return to the plaintiff of the aircraft documentation and the listed items in the scenario where the anton piller order is executed and the subject documents cannot be found. Prayer 9 is a restraining order to restrain the defendants from using, destroying, parting with possession, converting the aircraft documentation and listed items, unlawfully interfering with the plaintiff's trade and business and conspiring and agreeing to commit unlawful acts to interfere with the plaintiff's trade and business pending the disposal of the action and prayer 10 is for liberty to the plaintiff to use the aircraft documentation and listed items for the purpose of these proceedings and with the leave of the court in any other proceedings against the defendants.

ANALYSIS AND FINDINGS OF THE COURT

[11] In support of prayer 8, the plaintiff relied on the case of *Locabail International Finance Ltd v Agroexport and others; The Sea Hawk* [1986] 1 All ER 901 where the English Court of Appeal laid out the test to be applied for the grant of an interlocutory mandatory injunction as follows:

> I shall deal first with the question of the test which is to be applied. In my judgment this is correctly stated in 24 *Halsbury's Laws* (4th Ed) para 948 in a passage headed 'Mandatory injunctions on interlocutory applications'. That passage reads:
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> > A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application.
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> One of the cases cited in support of that passage is the decision of Megarry J in *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402; [1971] Ch 340; in the course of his judgment Megarry J said [1970] 3 All ER 402 at 412, [1971] Ch 340 at 351):
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> > Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and this is a higher standard than is required for a prohibitory injunction.

[12] The English Court of Appeal went on to state that the principle above is not affected by the test in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 because an interlocutory mandatory injunction, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.

[13] In *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192 (SC) at p 194, the Supreme Court applied a test consistent with the test in *Locabail* and held that the discretion to grant an interlocutory mandatory injunction must only be exercised in exceptional and extremely rare cases. The case must be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial.

[14] In *Cekal Berjasa Sdn Bhd v Malaysia Building Society Bhd* [2005] 3 MLJ 646 (HC), the court found that the defendant in that case had acted unreasonably and/or mala fide and/or in breach of a settlement agreement entered between the plaintiff and the defendant. This was found to constitute a special circumstance justifying the grant of an interlocutory mandatory injunction.

[15] In the present case, the aircraft documentation and the listed items indisputably belong to the plaintiff. They do not and cannot conceivably be said to belong to the second defendant and the second defendant can have no basis for claiming to be legally entitled to possession of the subject documents.

[16] What the second defendant did in entering upon the plaintiff's premises and removing the aircraft documentation and the listed items clearly amount to a conversion of the plaintiff's property. To date, the second defendant has yet to file any affidavit in reply and is thus taken to admit to the facts asserted by the plaintiff through the plaintiff's affidavits in support. The second defendant was served on 26 April 2018 (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 286).

[17] Accordingly, I am of the view that there exist special circumstances and the case is a clear on where the grant of an interim mandatory injunction can be supported. As such, I order the second defendant to deliver up the aircraft documentation and listed items to the plaintiff within 14 days after service of the order on the second defendant.

[18] Prayer 9 of encl 5 is framed as a prohibitory injunction. It is complementary to prayer 8 in that it seeks to prevent any damage being done to the plaintiff's property and business pending determination of this suit as well as prevent the use of the listed items by the defendants.

[19] The principles in respect of the grant of a prohibitory injunction are set out in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 where the Court of Appeal referred to *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504. The applicable principles may be summarised as follows:

(a) principle 1: the court is to determine whether there is bona fide serious question to be tried. At this stage, the court does not make a determination on the merits of the claim or defence to it. It is sufficient for the court to identify with precision the issues raised on the joinder and whether these are serious enough to merit a trial. See also: *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132 at p 1351 right column;

(b) principle 2: if there is a serious question to be tried, the court then considers where the justice of the case lies. if after weighing all matters, the court comes to the conclusion that the applicant would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the applicant is in a financial position to meet his undertaking in damages; and

(c) principle 3: the court is to bear in mind that the remedy is to produce a just result for the period between the date of the application and the trial proper and is intended to maintain the status quo.

[20] In determining whether there is a serious question to be tried, it is submitted by the plaintiff that the following questions may arise for determination:

(a) whether the defendants had committed a tort of conversion removing the listed items from the possession and custody of the plaintiff from the plaintiff's premise and refusing to return the same; and

(b) whether the actions of the first defendant, who was then the director of the plaintiff at the time of removal of the listed items from the plaintiff's premises, constituted a breach of his fiduciary and/or statutory duty as a director of the plaintiff and misuse of his power as a director of the plaintiff.

[21] As regards the balance of convenience, the plaintiff's position is that it would suffer irreparable damage if the injunction is not granted because the listed items do not merely involve the subject aircraft but also books, records and accounts of the plaintiff which are required by it for the conduct of its business as well as to ensure that it complies with various law. Further, the plaintiff would be in breach of its contractual obligations to nasim if the aircraft documentation is, in any way damaged.

[22] The defendants have no discernible right to the listed items. It follows that they ought not to be able to use the listed items in any way.

[23] It is submitted that it is unclear as to whether the second defendant is still operating as a business. This can be seen from affidavits of the solicitors for

the plaintiff and the supervising solicitors who found the premises where the second defendant should be operating its business (Schedule 1 of encl 5) empty when they were there to serve and executed the sealed anton piller order. Yap Vern-Chieh, Gary's affidavit (encl 20) states that he was informed by two people who work in a mechanic workshop nearby the second defendant's Ara Damansara office that they hardly see anyone going into the second defendant's said office. Another lady who works in the adjacent office to the second defendant's Ara Damansara office said the second defendant is no longer in business operation and all the staff had left the office. This casts doubt as to whether the second defendant is in a financial position to provide an adequate remedy to the plaintiff in the event of the plaintiff succeeding at trial and is awarded damages.

[24] In the event the injunction is granted and the defendants should succeed at the trial, the damage caused to the defendants would be minimal as the running of their business would not be affected by the injunction. The plaintiff submits that neither of the defendants have the legal right or ownership to the listed items and therefore cannot be said to be affected by being prohibited from using such items.

[25] Given the above, I am of the view that the balance of convenience and the justice of this case clearly lies in favour of the plaintiff.

[26] As regards principle 3 ie maintaining the status quo, in *Dato' Jaffar bin Mohd Ali & Anor v Jasatera Bhd & Ors* [2000] 2 MLJ 277 (CA) at pp 279G–280C, it was held that in deciding whether and how to maintain the status quo, a judge should direct his mind to the state of affairs as it existed before the events leading up to the suit. Where a judge considers the situation only as it exists after these events have occurred, he falls into error and will have failed to address his mind correctly on the question of status quo.

[27] As such, I agree with the plaintiff that the interim injunction in terms of prayer 9 ought to be granted to preserve the status quo.

[28] Prayer 10 is sought merely to allow the plaintiff to use the listed items returned to it pursuant to prayer 8 for purposes of its business. This is in recognition of the fact that the listed items belong to the plaintiff and are required by it for conduct of its business. Further the plaintiff seeks leave to use any information, documents or material obtained as a result of this order for purposes of these proceedings and other potential proceedings. This prayer is ancillary or complementary to prayers 8 and 10 and therefore should be granted.

[29] I agree with the plaintiff's submission that prayer 10 ought to be granted as well.

[30] Accordingly, I grant order in terms of prayers 8, 9 and 10 of the notice of application in encl 5.

Order in terms of prayers 8, 9 and 10 of notice of application in encl 5 granted.

Reported by Mohd Kamarul Anwar